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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

SYLVIA OCHOA, Individually and as Personal Representative, etc., et al., Plaintiffs and Appellants, v. SETTON PISTACHIO OF TERRA BELLA, INC., et al., Defendants and Respondents.	F073978 (Super. Ct. No. VCU255716) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Melinda Myrle Reed, Judge.

The McMillan Law Firm, Scott A. McMillan, Marilyn S. Phelps, and Lauren Hanley-Brady for Plaintiffs and Appellants.

Raimondo & Associates, Anthony Raimondo and Gerardo V. Hernandez for Defendants and Respondents Setton Pistachio of Terra Bella, Inc., and Terra Bella Agland, LLC.

No appearance for Defendant and Respondent Dole Food Company.

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Plaintiffs Sylvia Ochoa and Angie Ruiz appeal from the Tulare County Superior Court's June 14, 2016 judgment entered on an order granting summary judgment in favor of defendants Setton Pistachio of Terra Bella, Inc. (Setton Pistachio) and Terra Bella Agland, LLC (Terra Bella Agland).[1] For the reasons set forth below, we affirm the judgment.

Plaintiffs also appeal from the court's June 14, 2016 order denying, in part, a motion to tax costs awarded to defendant Dole Food Company (Dole).[2] For the reasons set forth below, we affirm the order.

FACTUAL AND PROCEDURAL HISTORY

Decedent Fernando Santiesteban, Ochoa's husband, was a maintenance worker at Setton Pistachio's processing facility in Terra Bella, California. On February 11, 2011, Santiesteban was charged with servicing a 120-foot "east-west wet auger," namely extricating the helical screw from the subterranean metal trough in preparation for a replacement unit. However, while he was in the middle of performing this task, a coworker activated the screw. Santiesteban was fatally wounded as a result.

On February 11, 2013, Ochoa brought a wrongful death action against Setton Pistachio. She alleged the exclusive remedy provisions of the workers' compensation statute[3] did not bar the action in view of the power press exception.[4]

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1 This appeal was dismissed as to the following parties: Setton Properties, Inc.; Setton International Foods of Brooklyn, Inc.; Setton Equities, LLC; Setton Farms, Inc.; Setton Realty Company, Inc.; and Setton Realty LLC.

2 In *Ochoa v. Setton Pistachio of Terra Bella, Inc.* (Apr. 16, 2019, F073844) (nonpub. opn.), plaintiffs separately appeal from the superior court's March 15, 2016 judgment entered on an order granting summary judgment in favor of Dole.

3 See Labor Code sections 3601, 3602, and 5300.

4 See Labor Code section 4558.

On March 13, 2013, plaintiffs' counsel deposed Uwe Trankmann, a Setton Pistachio employee. The following exchange transpired:

"Q. Okay. Do you . . . have an idea when Setton [Properties, Inc.,] bought the [Terra Bella facility]?

"A. In the '90s, before '97.[5]

"Q. Has any of the equipment been upgraded since then?

"A. Yes.

"Q. Can you tell me what part of the equipment has been upgraded? . . .

"A. The whole huller[6] got upgraded.

"Q. The whole huller?

"A. Yeah, the auger system, they got made bigger before, they got replaced because there was one out. Machines, they get old, worn out, got replaced.

"Q. . . . [W]as any part of the auger system that Mr. Santiesteban got tangled in, . . . had that been replaced previously?

"A. Before, I think five, six years before.

"Q. Who was the company that did that work?

"A. Setton ourselves. [¶] . . . [¶]

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5 Setton Properties, Inc., purchased the Terra Bella facility from Dole on July 13, 1995. Setton Pistachio was the guarantor.

6 At his deposition, Jeff Gibbons (see at p. 4, *post*) described a huller:

"It's a peeler . . . built by a company called Magnuson and it's a series of 23 rollers that are spinning and they've got an abrasive bit on it and all the pistachios are inside and they're just being ground off and then the pistachio hulls are washed away from the good pistachios and then they fall out and fall into the conveying auger that's in the bottom of that machine."

"Q. Do you know who did the design itself? Was the design done in-house or was there an engineer hired to do the design?

"A. The auger was there, we only replaced the auger itself with the bearings.

"Q. Okay. So just basically the bearings, you put new bearing and a new –

"A. Bearings and a new auger.

"Q. – a new auger?

"A. Yeah.

"Q. And was this auger, this replacement auger, was it shipped in and you and your crew –

"A. It got shipped in, yes."

On March 5, 2015, Ochoa and Ruiz, the guardian ad litem of Santiesteban and Ochoa's children, filed an amended complaint adding Terra Bella Agland as a defendant. Plaintiffs alleged Terra Bella Agland was strictly liable for the east-west wet auger's manufacturing, design, and/or warning defects; was a seller of chattels that misrepresented the east-west wet auger to a consumer; breached the implied warranties of fitness and merchantability; negligently manufactured, designed, sold, leased, supplied, furnished, and/or failed to provide warnings about the east-west wet auger; exclusively controlled the instrumentality that caused Santiesteban's death, which was a type of event that ordinarily would not occur in the absence of one's negligence; and negligently owned, possessed, and/or controlled the Terra Bella facility and allowed a dangerous condition on the property.

On September 22, 2015, plaintiffs' counsel deposed Jeff Gibbons, Setton Pistachio's plant manager. The following exchange transpired:

"Q. . . . [T]he auger that's handling the waste, is that the east-west [auger] or is that the north-south [auger] or are there multiple augers?

"A. There's multiple augers. There's augers under every [hul]ler and all those T into the north-south auger. Then the north-south auger dumps into the east-west auger. The east-west auger goes to the waste water pit. [¶] . . . [¶]

"Q. Have you heard of anybody going through the screen on any of the augers and getting their foot cut?

"A. Yes.

"Q. What was that incident?

"A. That was back at the huller where those underground augers, he stepped on an auger plate and the auger plate that protects the auger, it gave way and his foot went into an auger and it cut his toes off his foot.[7] [¶] . . . [¶]

"Q. After the accident with the screen on the northwest auger, was there anything done? Did you do anything to inspect the equipment?

"A. Yeah, we put new covers on all the augers – all the floor augers, bolt down covers that could not be removed except by . . . maintenance personnel.

"Q. What was involved in that change?

"A. Removal of all of the old covers [a]nd then manufacture of new covers with mounting screws that mounted them to the cement. [¶] . . . [¶]

"Q. Is the east-west auger on the floor as well?

"A. Yes.

"Q. Did that have a covering?

"A. Yes.

"Q. Were any of those coverings ever later removed to those auger troughs?

"A. They were removed for maintenance but not operationally.

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7 This incident occurred between 1996 and 1998.

"Q. How often would they be removed for maintenance?

"A. . . . Several years. There's really not a lot of maintenance to do on the augers, maybe once every five years.

"Q. What kind of maintenance is done on augers?

"A. There could be – on the auger itself, they just run until they're worn out.

"Q. How does an auger wear out?

"A. Over time just by – they were black iron and so they're in water a lot so they just rust. Once they're wore out then they're replaced. By abrasion or just by – in this case just by rusting, water wet environment. [¶] . . . [¶]

"Q. Where does the east-west auger go?

"A. That carries the water and hulls to the waste water pit.

"Q. What is the waste water pit?

"A. That's a pit in the concrete. It's about 15 feet by 10 feet wide and about 8 feet deep where all the water from the huller flows into from the waste water augers.

"Q. Then what happens . . . in that pit?

"A. There's water pumps that pump the water onto dewatering screens so the hull is separated from the water. The water goes into the waste water pond and then the hull gets conveyed into trucks that carry the hull material away from this plant.

"Q. What's the hull material used for?

"A. Either fed to cattle or used for composting. [¶] . . . [¶] . . . [I]t's 90 percent water. It's mainly just an operation of just hauling it off . . . . There's no value in it. We do have a way of disposing it so it gets reused, either by those operations either the composting or . . . the cattle feed."

On or about September 25, 2015, Setton Pistachio and Terra Bella Agland moved for summary judgment. They contended:

> "According to . . . Labor Code [section 4558, subdivision (b)], 'an employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press.'. . . Here, the east-west wet auger in Setton[Pistachio]'s Terra Bella facility which caused the death of . . . Santiesteban was not a 'power press' as defined by the aforementioned statute. . . . Thus, Plaintiffs cannot succeed on a claim based on Labor Code [section] 4558 because they will be unable to prove an essential element[] of the statute. . . .
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> "[Plaintiffs' allegations of strict products liability, false representation, and breach of implied warranties] . . . should also be adjudicated as a matter of law . . . . Since Setton [Pistachio] and [Terra Bella Agland] were not involved with the manufacturing, design or sale of the east-west wet auger, all of the aforementioned causes of action[] are inapplicable to both Setton [Pistachio] and [Terra Bella Agland], and Plaintiffs cannot prove an essential element of each of those causes of action[].
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> "Lastly, [Plaintiffs allege] . . . additional negligence[-]based causes of action against [Terra Bella Agland]. Plaintiffs cannot succeed [o]n any of these claims unless [they] establish[] a legal duty owed by [Terra Bella Agland]. In order for such duty to be owed, [Terra Bella Agland] must possess ownership and/or control over the Terra Bella [f]acility. Since [Terra Bella] do[es] not possess either the ownership or requisite level of control to trigger such duty, this Court should summarily dismiss [these] causes of action . . . ." (Boldface & underlining omitted.)

In support of their summary judgment motion, defendants submitted three declarations, all of which were executed on September 25, 2015. Gibbons's declaration read:

> "1. I am the Plant Manager at Setton Pistachio . . . , located in the City of Terra Bella, County of Tulare. I have held the same position at

Setton [Pistachio] since 1995. Furthermore, I worked at the same facility for Dole . . . prior to 1995.[8]

"2. My duties as the Plant Manager include overseeing all production-related activities at the Terra Bella facility.

"3. I was employed by Setton [Pistachio] as the Plant Manager when . . . Santiesteban . . . was killed in an accident by a machine referred to as the east-west wet auger (the 'wet auger') at Setton[Pistachio]'s Terra Bella facility on February 11, 2011. Mr. Santiesteban was in the process of removing and dismantling the wet auger when the accident occurred.

"4. I have personal knowledge of the functions, purpose and background history of all of the machinery and equipment at Setton[Pistachio]'s Terra Bella facility, including the wet auger.

"5. The wet auger in Setton[Pistachio]'s Terra Bella . . . facility was already installed when Setton [Properties, Inc.,] purchased the facility in 1995. Setton [Pistachio] did not design or manufacture the wet auger, which was there before Setton [Properties, Inc.,] bought the plant. Setton [Pistachio] does not sell this type of machinery.

"6. The wet auger was a conveyor that transported wastewater and organic waste to a waste pond for composting and disposal.

"7. The wet auger used a large, rotating helical screw to move debris along covered underground trenches. A motor turns a chain that rotates the auger's screw.

"8. The material moved by the wet auger did not take the shape of the auger screw or the trench where it was moved. The loose material simply dumped into a pit at the end of the trench.

"9. The auger screw rotated in a manner that kept the material loose so it could move easily through the trench, and so it would drop easily into the waste pit or pond. [¶] . . . [¶]

"I know the above from my own personal knowledge and could competently testify thereto in a court of law. I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct . . . ."

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8 See footnote 5, *ante*, page 3.

The declaration of Lee Cohen read:

> "1. I am the General Manager at Setton Pistachio . . . , located in the City of Terra Bella, County of Tulare. I have held the same position at Setton [Pistachio] for approximately five years.
>
> "2. My duties as the General Manager include the managerial, operational, financial, logistical, administrative and technical activities of Setton [Pistachio] at the Terra Bella facility.
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> "3. I was employed by Setton [Pistachio] as the General Manager when . . . Santiesteban . . . died in an accident while working on a machine referred to as the east-west wet auger (the 'wet auger') at Setton[Pistachio]'s Terra Bella facility on February 11, 2011. Mr. Santiesteban was in the process of removing and dismantling the wet auger when the accident occurred.
>
> "4. I have knowledge of the functions, purpose and background history of all of the machinery and equipment at Setton[Pistachio]'s Terra Bella facility, including the wet auger. I have access to all of [Setton Pistachio]'s business records, and am familiar with the history of the facility.
>
> "5. The wet auger in our Terra Bella . . . facility was already installed when [Setton Properties, Inc.,] purchased the facility in 1995. Setton Pistachio did not design or manufacture the wet auger. Additionally, Setton [Pistachio] has never been involved in the sale of such machinery to potential purchasers.
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> "6. The wet auger was a conveyor that transported wastewater, hull waste, and other debris to a waste pond for composting and recycling. . . .
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> "7. The wet auger used a large, rotating helical screw to move debris along underground trenches covered by steel plates. The rotations of the wet auger's screw were powered by a belt/chain drive attached to a sprocket. The sprocket which rotates the auger screw was powered by a motor that is controlled by an on/off switch located adjacent to the wet auger.
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> "8. The material transported by the wet auger did not take the form of the helical shape of the auger screw or the passage through which it flowed.

"9. The wet auger does not impart shape by impacting or pressing against or through material. The auger screw rotated in a manner that broke up loose material and transported it for disposal. [¶] . . . [¶]

"I know the above from my own personal knowledge and could competently testify thereto in a court of law. I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct . . . ."

Finally, the declaration of Stewart Fellner read:

"1. I am the Chief Financial Officer . . . at Setton Pistachio . . . , located in the City of Terra Bella, County of Tulare.

"2. My duties . . . include the administrative, financial, and risk management operations of the company, the development of a financial and operational strategy, metrics tied to that strategy, and the ongoing development and monitoring of control systems designed to preserve company assets and report accurate financial results. I work in the management of a business enterprise that is comprised of a number of different, but related, legal entities.

"3. I was employed by Setton [Pistachio] as the [Chief Financial Officer] when . . . Santiesteban . . . died in an accident while working on a machine referred to as the east-west wet auger (the 'wet auger') at Setton[Pistachio]'s Terra Bella facility on February 11, 2011.

"4. I have knowledge of all of Setton[Pistachio]'s assets and financial structure. To that end, there is a network of corporate entities which serve very specific functions and purposes within Setton[Pistachio]'s financial structure. Accordingly, I have knowledge of the functions, purposes and finances of all corporate entities within the aforementioned network of corporate entities.

"5. . . . Terra Bella Agland . . . [is a] corporate entit[y] that belong[s] to the network of corporations within Setton[Pistachio]'s financial structure. However, [Terra Bella Agland does not] have any ownership or possessory interest in the land where Setton[Pistachio]'s Terra Bella . . . processing plant is located. [Terra Bella Agland is] involved in elements of the operation entirely unrelated to the processing plant where the accident occurred, and . . . ha[s] [no] ownership or control of the processing facility. [¶] . . . [¶]

"7. . . . All rules, policies, guidelines and safety procedures which govern the activities of employees within the [Terra Bella] [f]acility were

> set forth by Setton Pistachio . . . . In fact, Setton Pistachio . . . has exercised exclusive control over all operations conducted in the [Terra Bella] [f]acility since it was purchased from Dole . . . .
>
> "I know the above from my own personal knowledge and could competently testify thereto in a court of law. I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct . . . ."

On November 17, 2015, plaintiffs filed an ex parte motion to continue the hearing on defendants' summary judgment motion. They argued a continuance was necessary to allow them to depose Cohen and Fellner. The court denied the motion but directed the parties to meet and confer. Plaintiffs' counsel deposed Cohen and Fellner on December 1 and 2, 2015, respectively.

On November 19, 2015, plaintiffs moved for a protective order. They accused Setton Pistachio's counsel of "improper[ly] . . . instruct[ing] [Gibbons] not to answer" and "ma[king] numerous improper speaking objections" at Gibbons's deposition. On November 30, 2015, plaintiffs moved to compel Gibbons to provide further responses to plaintiffs' questions at deposition and to respond to their requests for production of documents.

On November 23, 2015, defendants noticed the deposition of plaintiffs' expert Jay Preston for December 3, 2015. Plaintiffs objected. On December 2, 2015, defendants filed an ex parte motion to compel the deposition. The court ordered plaintiffs to produce Preston for deposition on or before December 7, 2015. Defense counsel deposed Preston on December 7, 2015.

On December 7, 2015, plaintiffs filed their opposition to defendants' summary judgment motion and once again asked the court to continue the summary judgment hearing. At the outset, they objected to Gibbons's, Cohen's, and Fellner's declarations. Plaintiffs alleged Gibbons, Cohen, and Fellner lacked personal knowledge; in addition, Gibbons and Cohen improperly relayed hearsay and expert testimony. Plaintiffs also

claimed defendants spoliated evidence, e.g., destroyed and disposed of the east-west wet auger shortly after the February 11, 2011 accident.[9]

In response to defendants' contentions, plaintiffs maintained: (1) the east-west wet auger was a power press; and (2) Terra Bella Agland manufactured, sold, and/or distributed the east-west wet auger. They conceded Terra Bella Agland neither owned, possessed, nor controlled the Terra Bella facility.

To support their argument the east-west wet auger was a power press, plaintiffs submitted Preston's declaration, which was executed on December 6, 2015. It read:

> "I, JAY WILLIAM PRESTON, declare that I am a Registered Professional Safety Engineer in California . . . and a Certified Safety Professional . . . by the Board of Certified Safety Professionals of the Americas, and I declare as follows: [¶] . . . [¶]
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> "3. One of my areas of expertise concerns safety and accident prevention in production machinery. In that connection, I have worked on a substantial number of accidents involving power presses, presses of many types and configurations, and similar machines as well as food machinery and conveyor equipment. I am considered an authority in conveyor safety and safeguarding. [¶] . . . [¶]

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9 Plaintiffs cited Setton Pistachio's responses to a set of special interrogatories:

> "Defendant has not disposed of any [equipment] related to the February 11, 2011 accident involving . . . Santiesteban. Defendant already was in the process of removing and dismantling the east-west wet auger when the accident occurred, and thereafter continued with this project. After removal, the pieces of the auger were placed in Defendant's scrap yard where they remained until Defendant sold them with other scrap metal. [¶] . . . [¶]
>
> "Defendant is unsure of the exact date on which the east-west auger was disposed of. The auger was kept by Defendant in its scrap yard pending the investigations conducted by [Division of Occupational Safety and Health (Cal/OSHA)], the Tulare County Sheriff's Department, and defense counsel. After the investigations were complete, Defendant contacted . . . an outside contractor who Defendant regularly uses in the disposal of scrap metal, to dispose of the auger."

"15. I was retained to investigate and evaluate the causative factors involved with the machine incident of Mr. Santiesteban at the Setton Pistachio packing plant in Terra Bella, California.

"16. Part of my investigation was to consider whether or not the machine incorporating the East West wet auger, a screw conveyor, of the Santiesteban incident meets the legislative definition of 'power press,' which is cited as part of [s]ection 4558 of the Labor Code, from the perspective of a Safety Engineer. [¶] . . . [¶]

"18. To assist with my analysis I was given and reviewed the documentary evidence on the attached list as **Exhibit 'B'**. . . . Exhibit[] B . . . [is] made part of this declaration.[10]

"19. I made an inspection of the scene on November 17, 2015, and photographed and measured the immediate area of the East West wet auger and the machine controllers. . . .

"20. The equipment that I viewed was either permanently embedded in the ground, i.e., the subterranean auger trough, or firmly affixed through bolts. The 'machine' is a synchronized system of hullers and multiple augers and presses. [¶] . . . [¶]

"22. Neither the subject helical screw or the trough was available for a forensic inspection, both having been removed. The East-West wet auger or screw conveyor that Mr. Santiesteban died in, has not been identified as to manufacturer. The replacement consists of an auger screw said to be 18 inches in diameter. It is mounted in a round bottom metal trough, 18 inches wide and over 100 feet long that is embedded in ground about 3 feet under the concrete pad of the raw nut processing area. It runs from a wet waste sump pit that serves as the receptacle for the material conveyed to the eastern end. Its motor, reduction gear transmission, and chain drive are located at the eastern end over the sump pit. The conveyor runs westward across an access road between a row of driers and under a bank of Magnuson nut hullers, which receive unhulled pistachio nuts, and by way of operation of a helical screw within that machine and it's a series of 23 rollers that are spinning with an abrasive bit, the pistachio hull is removed. The pistachio hull falls into the East-West auger trench. The east-west wet auger that was the immediate agency of the Santiesteban fatality is part of a much larger machine for processing nuts and other

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10 Documentary evidence reviewed by Preston included photographs of east-west wet auger on the day of the February 11, 2011 accident.

products, which is controlled by a programmable logic controller which acts to synchronize the other parts of the machine. The east-west auger transports wet hull and nut waste gathered from the north-south auger and the bank of huller machines along its run, to the sump pit. Then the water with the debris is pumped onto dewatering screens. . . . The hull falls into another auger, it falls in an incline auger, and then falls into a press where the remaining water is squeezed from the material. The material then falls into a dry auger, onto the dry auger incline, where it is loaded on top of trucks. . . . [¶] . . . [¶]

"24. From the sump pit, the system includes three extrusion machines described, marked and labeled as presses. These take the wet hulls conveyed by the east-west wet auger and force them through dies to change their shape by forming into chunks and pieces, or some other shape of material to be distributed as cattle feed or biofuel. This squeezing between metal parts that form and impart their image to the material supports that the integrated machine, including the presses and the East-West wet auger in question is indeed a power press in the eyes of the California State Legislature.

"25. The controller and switches for the presses are in the same panel as that for the East West wet auger. The presses are apparently controlled by the same programmable logic controller, which is energized through the main breakers and switch gear as the east-west wet auger and feed auger, and the augers and presses which squeeze the material. . . .

"26. The subject 'machine,' is a series of components of equipment that were activated when [Santiesteban's coworker] activated the switch which energized the logic control unit for the system, which in turn activated the electric motor and turned the helical screw.

"27. . . . Helical screws move material through pressure and shear effect. . . .

"28. Here, the pistachio hulls fell from the huller machine through a chute, into openings in the auger trough where the material was mixed with water. The helical screw, or 'auger,' as it has been referred to, reduced some of the material in size crushing or scraping it between the wall of the trough and the flights of the helical screw. The equipment applies pressure between metal parts.

"29. In reviewing the coroner's report, the injuries that . . . Santiesteban suffered were consistent with the forces which the screw brought to bear upon material. . . . [¶] . . . [¶]

"32. In the case of the incident presses, the dies impart a new shape to the amorphous wet nut hull or husk residue, imparting a distinctly different solid shape to the material that was fed into it, specifically for the purpose of manufacturing a different product: compressed cattle feed. [¶] . . . [¶]

"42. The solid metal plates that covered the auger trough had been removed and pushed aside to gain access. Since the wet auger was cleaned manually by water sprayed from hoses while running, it should have been covered by a grating, rather than solid plates. . . . [T]he original design of the augers implemented grating. . . . [¶] . . . [¶]

"62. My conclusions are as follows:

"a. On the issue of whether the equipment is a power press: The machine system that killed Mr. Santiesteban met the definitions of a [Labor Code s]ection 4558 power press. It utilized a die, a usually metal block designed to impart its shape to some other material. It formed or changed the shape of the material, wet nut hull residue. It made another product, green cattle feed.

"b. The employer of Mr. Santiesteban had instructed to remove the screw from the trough of the east-west wet auger, which necessitated the removal of the covers. The covers were removed.

"c. The covers were originally installed by the installer of the equipment and subsequently replaced by Mr. Santiesteban's employer. The new covers were solid steel, rather than grate."

To support their argument Terra Bella Agland manufactured, sold, and/or distributed the east-west wet auger, plaintiffs cited Preston's declaration as well as the deposition testimonies of Trankmann and Gibbons. (See *ante*, at pp. 3-6.)

On December 11, 2015, in a tentative ruling, the court overruled plaintiffs' objections to Gibbons's, Cohen's, and Fellner's declarations and granted defendants' summary judgment motion. Following a December 14, 2015 hearing, the court adopted its tentative ruling.

On December 24, 2015, plaintiffs moved to compel Gibbons to provide further responses to plaintiffs' questions at deposition and compel defendants to respond to their requests for production of documents.

On January 25, 2016, the superior court denied plaintiffs' motions to compel discovery and their motion for a protective order.

Judgment was entered on June 14, 2016.

DISCUSSION

I. Judgment entered on order granting summary judgment in favor of Setton Pistachio and Terra Bella Agland

a. *Overview of summary judgment law*

Summary judgment "provide[s] courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*); see *Lee v. Marchetti* (1970) 4 Cal.App.3d 97, 99 [" 'The salient philosophy behind this procedural device is to provide a method for the prompt disposition of actions and proceedings which have no merit and in which there is no triable material issue of fact . . . .' " (italics omitted)].) A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact." (Code Civ. Proc., § 437c, subd. (c).)

A defendant seeking summary judgment bears an initial burden to produce evidence demonstrating either one or more elements of the cause of action cannot be established or there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Aguilar, supra*, 25 Cal.4th at pp. 849-850, 854-855.) If the motion is made against a plaintiff who would bear the burden of proof by a preponderance of evidence at trial, the defendant "must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Aguilar, supra*, at p. 851, italics & fn. omitted.) If the defendant makes a prima facie showing, then the burden of production "shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(2).) "The plaintiff . . . shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto." (*Ibid.*) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, at p. 850, fn. omitted.)

"[F]rom commencement to conclusion, the party moving for summary judgment bears the burden of persuasion[11] that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.)

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11 Whereas a burden of production entails only the presentation of evidence, a burden of persuasion entails the establishment of a requisite degree of belief by way of such evidence. (*Aguilar, supra*, 25 Cal.4th at p. 850.)

b. *Overview of pertinent substantive law*

i. Workers' compensation

"Where an employee is injured in the course and scope of his or her employment, workers' compensation is generally the exclusive remedy of the employee and his or her dependents against the employer." (*LeFiell Manufacturing Co. v. Superior Court* (2012) 55 Cal.4th 275, 279 (*LeFiell*), citing Lab. Code, §§ 3600, subd. (a), 3602.) "The 'exclusivity rule' is based upon a presumed compensation bargain: '[T]he employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' [Citation.]" (*LeFiell, supra*, at p. 279.)

"There are, however, limited statutory exceptions to the exclusivity rule that authorize the injured worker to seek to augment the workers' compensation benefits by bringing an action at law for damages against the employer. [Citations.]" (*LeFiell, supra*, 55 Cal.4th at pp. 279-280, citing Lab. Code, §§ 3602, 3706, 4558.) "One such exception is found in [Labor Code] section 4558, the 'power press exception.' [Labor Code s]ection 4558 authorizes an injured worker to bring a civil action for tort damages against his or her employer where the injuries were 'proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press,' where the 'manufacturer [had] designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer.' " (*LeFiell, supra*, at p. 280, quoting Lab. Code, § 4558, subds. (b), (c).)

" 'Power press' means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products." (Lab. Code, § 4558, subd. (a)(4).) "This definition entails four elements. The power press itself is a machine. It is

a machine that forms materials. The formation of materials is effectuated with a die. Finally, the materials being formed with the die are being formed in the manufacture of other products." (*Ceja v. J. R. Wood, Inc.* (1987) 196 Cal.App.3d 1372, 1376.)

"[T]he term 'die' clearly denotes not *all* material-forming tools, but a subset of such tools. The devices described in dictionary definitions of 'die' generally share two pertinent characteristics. First, they impart form to the material by impact or pressure *against* the material, rather than *along* the material. Second, they impart to the material some version of the die's own shape. The two characteristics are logically related, since the die, acting by impact against the material, can only alter the form of the material where it impacts it, necessarily leaving an impression or cutout of its own shape (unlike a linear cutting blade that, moving along the surface of the material, can be directed to cut out any desired shape)." (*Rosales v. Depuy Ace Medical Co.* (2000) 22 Cal.4th 279, 285 (*Rosales*); see *Graham v. Hopkins* (1993) 13 Cal.App.4th 1483, 1488 ["[T]he shape of the 'die' itself determines the shape of the product that is formed. That is, in each case, the product formed or the cut made is in some sense a 'mirror image' of the die."].) "In defining a 'power press,' for purposes of [Labor Code] section 4558, in terms of a 'die,' the Legislature patently intended to embody the characteristic that differentiates 'press[es]' from other 'material-forming machine[s],' i.e., the use of a tool that imparts shape to material by pressing or impacting against or through the material, that is, by punching, stamping or extruding." (*Rosales, supra,* at p. 286.)

ii. Products liability

1. <u>Strict products liability</u>

"Where a defective or dangerous product causes personal injury, death or property damage to a foreseeable user or consumer, one who is engaged in the business of manufacturing or selling products for use or consumption and who placed the defective or dangerous product on the market, knowing it was to be used without inspection for

defects, will be held strictly liable in tort." (*Pierson v. Sharp Memorial Hospital, Inc.* (1989) 216 Cal.App.3d 340, 343.)

"[E]very supplier in the stream of commerce or chain of distribution, from manufacturer to retailer, is potentially liable." (*Edwards v. A.L. Lease & Co.* (1996) 46 Cal.App.4th 1029, 1033.) " '[T]he purpose for this "stream of commerce" approach to strict liability is to extend liability to all those engaged in the overall producing and marketing enterprise who should bear the social cost of the marketing of defective products. [Citation.] By extending liability to entities farther down the commercial stream than the manufacturer, the policy of compensating the injured plaintiff is preserved, and retailers and distributors remain free to seek indemnity against the manufacturer of the defective product.' [Citation.]" (*Id.* at pp. 1033-1034.)

2. Negligence-based products liability

" 'For the cause of action for strict products liability there is no necessity to show duty or breach of duty but only that the product was defective and that the injury to the plaintiff was caused by that defective condition.' [Citation.] In contrast, to prevail on a negligence claim, [the plaintiff] must show that [the defendant] owed her a legal duty, breached the duty, and that the breach was a proximate or legal cause of her injury. [Citation.] In the context of a products liability lawsuit, '[u]nder a negligence theory, a plaintiff must also prove "an additional element, namely, that the defect in the product was due to negligence of the defendant." ' [Citation.]" (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 793.)

"Res ipsa loquitur is an evidentiary rule for 'determining whether circumstantial evidence of negligence is sufficient.' [Citation.]" (*Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155, 1161.) "In order to invoke res ipsa loquitur, the plaintiff has the burden to establish three conditions: '(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must

not have been due to any voluntary action or contribution on the part of the plaintiff.' [Citations.]" (*Ibid*.) "The doctrine's second condition, as traditionally formulated, is that the agency or instrumentality causing the accident must have been within the exclusive control or management of the defendant. The purpose of this requirement is to link the defendant with the probability . . . that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362.)

3. False representation

"One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though [¶] (a) it is not made fraudulently or negligently, and [¶] (b) the consumer has not bought the chattel from or entered into any contractual relation with the seller." (Rest.2d Torts, § 402B; accord, *Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111, fn. 3; *Westlye v. Look Sports, Inc.* (1993) 17 Cal.App.4th 1715, 1750-1751.)

4. Breach of warranty

"The essential elements of a warranty cause of action are: '1. There was a sale of goods; the defendant was the seller, and plaintiff a buyer; [¶] 2. Defendant [expressly] [or] [impliedly] warranted the goods sold; [¶] 3. There was a breach of warranty; [and] [¶] 4. The breach of warranty caused plaintiff to suffer injury, damage, loss or harm[.] [; and] [5. The plaintiff gave defendant timely notice of the breach of warranty.]' [Citation.]" (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 415-416.)

iii. Premises liability

"The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1158.) "[T]he duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of

the premises and the attendant right to control and manage the premises." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368.)

c. *Analysis*

i. Declarations of Gibbons, Cohen, and Fellner in support of summary judgment motion

"Summary judgment law . . . require[s] a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence. . . . [T]he defendant *must* 'support[]' the 'motion' with evidence including 'affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice' must or may 'be taken.' [Citation.] The defendant may, but need not, present evidence that conclusively negates an element of the plaintiff's cause of action. The defendant may also present evidence that the plaintiff does not possess, and cannot reasonably obtain, needed evidence . . . . But . . . the defendant *must* indeed present evidence . . . ." (*Aguilar, supra,* 25 Cal.4th at pp. 854-855, fns. omitted.) "The same rules of evidence that apply at trial also apply to the declarations submitted in support of and in opposition to motions for summary judgment. Declarations must show the declarant's personal knowledge and competency to testify, state facts and not just conclusions, and not include inadmissible hearsay or opinion." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761; accord, Code Civ. Proc., § 437c, subd. (d).)

On appeal, plaintiffs contend defendants "based their motion for summary judgment . . . entirely on inadmissible evidence . . . ." They specify the declarations of Gibbons, Cohen, and Fellner "each failed to affirmatively establish personal knowledge of the facts attested to." Plaintiffs add Gibbons and Cohen necessarily "learned all of the declared facts from an out-of-court statement or writing" and gave inadmissible expert testimony.

In general, "we review the trial court's final rulings on evidentiary objections by applying an abuse of discretion standard." (*Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 122; see *Alexander v. Scripps Memorial Hospital La Jolla* (2018) 23 Cal.App.5th 206, 226 [weight of authority holds appellate court reviews trial court's rulings on evidentiary objections made in connection with summary judgment motion for abuse of discretion]; *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1122-1123 (conc. opn. of Turner, P.J.) [same].) "[E]videntiary objections based on lack of foundation . . . are traditionally left to the sound discretion of the trial court." (*Alexander v. Scripps Memorial Hospital La Jolla*, *supra*, at p. 226.) "As the parties challenging the court's decision, it is plaintiffs' burden to establish such abuse, which we will find only if the trial court's order exceeds the bounds of reason." (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679.)

We find no abuse of discretion. Under penalty of perjury, Gibbons, Cohen, and Fellner—in their respective positions—averred the facts stated in their declarations were true and correct, based on personal knowledge of Setton Pistachio's operations and/or review of records used in the course of employment. (See *Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1169; *People ex rel. Owen v. Media One Direct, LLC* (2013) 213 Cal.App.4th 1480, 1484.) "The trial court was entitled to accept these assertions of personal knowledge." (*Butte Fire Cases*, *supra*, at p. 1169, fn. omitted.) Consequently, any claims these individuals improperly relayed hearsay and expert testimony fail.

ii. Summary judgment motion

"[A]s the reviewing court, we determine de novo whether an issue of material fact exists and whether the moving party was entitled to summary judgment as a matter of law. [Citation.] In other words, we must assume the role of the trial court and reassess the merits of the motion. [Citation.] In doing so, we will consider only the facts properly before the trial court at the time it ruled on the motion. [Citation.]" (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1601.) "We apply the same three-step analysis required of

the trial court. First, we identify the issues framed by the pleadings since it is these allegations to which the motion must respond. Second, we determine whether the moving party's showing has established facts which negate the opponent's claim and justify a judgment in the moving party's favor. When a summary judgment motion prima facie justifies a judgment, the third and final step is to determine whether the opposition demonstrates the existence of a triable issue of material fact." (*Hutton v. Fidelity National Title Co.* (2013) 213 Cal.App.4th 486, 493-494.)

In their declarations, Gibbons and Cohen attested: (1) an east-west wet auger was installed at the Terra Bella facility prior to the facility's purchase by Setton Properties, Inc., in 1995; (2) defendants did not manufacture, design, or sell the east-west wet auger or any other wet augers; (3) the east-west wet auger was a conveyor that transported hull waste to a waste pond for composting and disposal; (4) the east-west wet auger's helical screw loosened and moved the hull waste along a covered subterranean trough; and (5) the hull waste did not take the shape of the screw or the trough. In his declaration, Fellner indicated Terra Bella Agland did not own, possess, or otherwise control the Terra Bella facility. Hence, defendants satisfied their initial burden of production and established a prima facie case that (1) the east-west wet auger was not a power press and plaintiffs' wrongful death action against Setton Pistachio was not exempt from the exclusive remedy provisions of the workers' compensation statute, and (2) Terra Bella Agland neither manufactured, designed, or sold the east-west wet auger or other wet augers nor owned, possessed, or otherwise controlled the Terra Bella facility and could not be held liable on any of plaintiffs' causes of action against it. We must now decide whether plaintiffs produced evidence demonstrating the existence of a triable issue of material fact. We conclude they did not.

1. No triable issue as to whether the east-west wet auger was a power press

In his declaration, Preston stated he reviewed photographs of the east-west wet auger at the time of the February 11, 2011 accident. He also visited the Terra Bella facility on November 17, 2015, to inspect the scene of the accident. According to Preston, the east-west wet auger was a "screw conveyor" that "transport[ed] wet hull and nut waste gathered . . . along its run, to the sump pit." Its helical screw "move[d] material through pressure and shear effect" and "reduced some of the [wet hull waste] in size," "crushing or scraping it between the wall of the trough and the [screw's] flights . . . ." Preston affirmed the east-west wet auger was "the immediate agency" of the accident and the screw inflicted Santiesteban's fatal injuries. None of these observations, though, supported the notion the screw "punch[ed], stamp[ed] or extrud[ed]" (*Rosales, supra*, 22 Cal.4th at p. 285) a " 'mirror image' " (*Graham v. Hopkins, supra*, 13 Cal.App.4th at p. 1488) of its own shape on the wet hull waste. Rather, they substantiated Gibbons's and Cohen's statements. Because the east-west wet auger did not utilize a die, it was not power press as a matter of law.

Plaintiffs direct our attention to paragraphs 24 and 32 of Preston's declaration:

> "From the sump pit, the system includes three extrusion machines described, marked and labeled as presses. These take the wet hulls conveyed by the east-west wet auger and force them through dies to change their shape by forming into chunks and pieces, or some other shape of material to be distributed as cattle feed or biofuel. This squeezing between metal parts that form and impart their image to the material supports that the integrated machine, including the presses and the East-West wet auger in question is indeed a power press . . . . [¶] . . . [¶] . . . In the case of the incident presses, the dies impart a new shape to the amorphous wet nut hull or husk residue, imparting a distinctly different solid shape to the material that was fed into it, specifically for the purpose of manufacturing a different product: compressed cattle feed."

Nothing in these paragraphs remotely suggests the helical screw was a die. In fact, Preston seemingly concedes the east-west wet auger, by itself, was not a power press.

Instead, he refers to an "integrated machine"—the wet auger plus the three "extrusion machines" that "take the wet hulls conveyed by the . . . wet auger and force them through dies to change their shape by forming into chunks and pieces"—as the qualifying power press. "[Labor Code s]ection 4558 applies only to injuries proximately caused by the employer's knowing removal of, or failure to install, a point of operation guard on a power press." (*Rosales, supra*, 22 Cal.4th at p. 287.) There is no dispute the east-west wet auger's exposed screw caused Santiesteban's fatal injuries. Therefore, the pertinent inquiry was whether the wet auger was a power press, i.e., a "material-forming machine that utilizes a die which is designed for use in the manufacture of other products." (Lab. Code, § 4558, subd. (a)(4).) We will not countenance the proposition that the east-west wet auger, which did not utilize a die, could still be considered a power press due to its proximity to three extrusion machines that had nothing to do with the accident.

2. No triable issue as to whether Terra Bella Agland manufactured, sold or distributed the east-west wet auger or other wet augers

In their opposition to defendant's summary judgment motion, plaintiffs alleged Terra Bella Agland manufactured, sold, and/or distributed the east-west wet auger because (1) five to six years before the February 11, 2011 accident, the east-west wet auger was replaced with "new bearing[s]" and a "new auger" "shipped in"; and (2) as early as 1996 (see *ante*, at pp. 3, 5 & fn. 7), and February 11, 2011, the floor grates concealing the east-west wet auger were replaced with solid steel covers. None of these facts, though, showed Terra Bella was "engaged in the business of manufacturing or selling [or distributing the east-west wet auger] for use or consumption and . . . placed the [east-west wet auger] on the market . . . ." (*Pierson v. Sharp Memorial Hospital, Inc.*, *supra*, 216 Cal.App.3d at p. 343; see *Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App.4th 565, 569 ["[A] product must be . . . placed in the stream of commerce . . . for imposition of strict liability . . . ."].)

On appeal, plaintiffs allege Terra Bella Agland manufactured the east-west wet auger because it "substantially modified" it and cite *Green v. City of Los Angeles* (1974) 40 Cal.App.3d 819 (*Green*) as supporting authority. In *Green*, a crane boom fell and struck two longshoremen, killing one. (*Id.* at p. 826.) The defendant corporation, the crane's seller, did not originally manufacture the crane. (*Id.* at p. 824.) Prior to the sale, however, the defendant added 3,000 pounds to the boom's counterweight to increase its load capacity from five tons to 14,000 pounds. (*Id.* at pp. 828-829.) In an action for wrongful death, the trial court found the defendant's defective redesign proximately caused one longshoreman's death and the other's personal injuries and found the defendant liable. (*Id.* at pp. 824, 828-829.) Division Five of the Second Appellate District affirmed the judgment, finding defendant's "extensive modifications" of the crane "was tantamount to a manufacturer insofar as liability . . . is concerned." (*Id.* at p. 838.)

In the instant case, plaintiffs produced evidence showing the previous east-west wet auger had been replaced with a new auger and bearings and the floor grating had been replaced with solid steel covers. These replacements are not equivalent to the "extensive modifications" seen in *Green*. (See *Green, supra*, 40 Cal.App.3d at p. 824 [crane was "rebuilt"].) Even assuming, arguendo, the replacements somehow rendered Terra Bella Agland tantamount to the east-west wet auger's manufacturer, "[i]t is a plaintiff's burden to produce evidence . . . linking the injury-producing product with a particular entity in the stream of commerce of that product." (*Taylor v. Elliott Turbomachinery Co. Inc.* (2009) 171 Cal.App.4th 564, 576; see *Bonus-Bilt, Inc. v. United Grocers, Ltd.* (1982) 136 Cal.App.3d 429, 435, 437 [one who designs or manufactures a product for his or her own use rather than for sale to the general public not subject to strict products liability].) Plaintiffs did not produce any evidence Terra Bella Agland sold or otherwise placed in the commercial stream the east-west wet auger or other wet augers. (Cf. *Green, supra*, at pp. 824, 828 [defendant sold defective crane].) Without

such evidence, plaintiffs cannot prevail on their causes of action for strict products liability (see *Bonus-Bilt, Inc. v. United Grocers, Ltd.*, *supra*, at p. 437), negligence-based products liability (see *Gonzalez v. Autoliv ASP, Inc.*, *supra*, 154 Cal.App.4th at p. 793 [negligence theory of products liability subsumes elements for strict products liability]), false representation (see *Hauter v. Zogarts*, *supra*, 14 Cal.3d at p. 111, fn. 3), and breach of implied warranties (see *Scott v. Metabolife Internat., Inc.*, *supra*, 115 Cal.App.4th at pp. 415-416). (See *ante*, at pp. 19-21.)

3. No triable issue as to whether Terra Bella Agland owned, possessed, or otherwise controlled the Terra Bella facility

In their opposition to defendant's summary judgment motion, plaintiffs conceded Terra Bella Agland did not own, possess, or otherwise control the Terra Bella facility. (See *ante*, at p. 12; see also *Le Bourgeois v. Fireplace Manufacturers, Inc.* (1998) 68 Cal.App.4th 1049, 1060, fn. 12 ["The rule is established '[t]he admissions of a party receive an unusual deference in summary judgment proceedings.' "]; *Cory v. Golden State Bank* (1979) 95 Cal.App.3d 360, 366 ["Furthermore, it is clear that the nonmoving party's admissions may be used to establish that no material factual issues remain to be resolved by trial."].) " '[A] defendant cannot be held liable for the [allegedly] defective or dangerous condition of property which it did not own, possess, or control. Where the absence of ownership, possession, or control has been unequivocally established, summary judgment is proper. [Citations.]' [Citation.]" (*Preston v. Goldman* (1986) 42 Cal.3d 108, 119.)[12, 13]

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[12] Lack of control also signifies the doctrine of res ipsa loquitur is inapplicable. (See *ante*, at pp. 20-21.)

[13] On appeal, plaintiffs complain the superior court improperly considered certain other declarations submitted by defendants to "augment [their] evidentiary showing." We conducted a de novo review and reached our holding without taking these challenged declarations into account.

4. Plaintiffs' claim of spoliation

Plaintiffs point out defendants dismantled and scrapped the east-west wet auger after the February 11, 2011 accident (see *ante*, at pp. 11-12 & fn. 9) and ask us to "consider the inferences raised by the spoliation of . . . evidence . . . ." (Boldface omitted.)

" 'Spoliation' is ' "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." ' [Citation.] '[D]estruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.' [Citations.]" (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 681.) "However, spoliation of evidence alone does not necessarily create a triable issue. In addition to spoliation, there must be ' "some (not insubstantial) evidence" for the plaintiff's cause of action . . . [to] allow the plaintiff to survive summary judgment.' [Citation.]" (*Id.* at p. 682.) Here, there was no such evidence. While Preston, plaintiffs' expert, declared he was unable to physically assess the east-west wet auger from the day of the accident, he was still able to describe the mechanical function of the east-west wet auger based on his examination of photographs taken on the day of the accident, his inspection of the accident site, and his expertise and experience with production machinery. As we discussed, Preston's observations corroborated defendants' evidence in support of summary judgment. Moreover, plaintiffs failed to provide evidence Terra Bella Agland manufactured, sold, or otherwise placed in the commercial stream the east-west wet auger or other wet augers and conceded Terra Bella Agland neither owned, possessed, or otherwise controlled the Terra Bella facility.

5. Plaintiffs' invocation of the single-enterprise rule

"The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interests." (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) "The alter

ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538; see *Minton v. Cavaney* (1961) 56 Cal.2d 576, 580 [alter ego doctrine applies to tort claims].) "Generally, alter ego liability is reserved for the parent-subsidiary relationship. However, under the single-enterprise rule, liability can be found between sister companies. The theory has been described as follows: ' "In effect what happens is that the court, for sufficient reason, has determined that though there are two or more personalities, there is but one enterprise; and that this enterprise has been so handled that it should respond, as a whole, for the debts of certain component elements of it. The court thus has constructed for purposes of imposing liability an entity unknown to any secretary of state comprising assets and liabilities of two or more legal personalities; endowed that entity with the assets of both, and charged it with the liabilities of one or both.["]' [Citation.]" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249-1250.)

On appeal, for the first time, plaintiffs invoke the single-enterprise rule to impose liability on Terra Bella Agland. This they cannot do. As we discussed, the exclusive remedy provisions of the workers' compensation statute barred plaintiffs from bringing a tort action against Setton Pistachio. "[P]ermitting employees of [one company, or their families,] to recover from [a sister company] under an alter ego theory of vicarious liability 'would give those employees an unwarranted windfall' by 'exempt[ing] [them] from the statutorily mandated limits of workers' compensation.' [Citation.]" (*Doney v. TRW, Inc.* (1995) 33 Cal.App.4th 245, 252.)

iii. Plaintiffs' claims of discovery error

Plaintiffs assert on appeal the superior court improperly denied various motions to compel discovery, a motion for a protective order to control deposition proceedings, and

multiple requests to continue the summary judgment hearing. They also assert the court improperly expedited Preston's deposition.

"Management of discovery generally lies within the sound discretion of the trial court." (*Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1612.) Furthermore, "when a plaintiff appeals from a judgment to obtain review of a trial court's discovery orders, the plaintiff 'must "show not only that the trial court erred, but also that the error was prejudicial"; i.e., the plaintiff must show that it is reasonably probable the ultimate outcome would have been more favorable to the plaintiff had the trial court not erred in the discovery rulings. [Citation.]' [Citation.] An appellant must 'show that the error was prejudicial [citation] and resulted in a "miscarriage of justice" [citation].' [Citation.]" (*Property Reserve, Inc. v. Superior Court* (2016) 6 Cal.App.5th 1007, 1020 (*Property Reserve*).)

In their opening brief, plaintiffs failed to allege prejudicial error with respect to the court's rulings on the motions to compel and the motion for a protective order. (See *Property Reserve*, *supra*, 6 Cal.App.5th at p. 1020.) "[W]e cannot presume prejudice" (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963) "[n]or will [we] act as counsel for [plaintiffs] by furnishing a legal argument as to how the trial court's ruling[s] w[ere] prejudicial" (*ibid*.). (Accord, *Property Reserve*, *supra*, at p. 1020.) Even assuming, arguendo, the court erred with respect to the challenged discovery rulings, we cannot conclude there was a reasonable probability defendants' summary judgment motion would have been defeated. Defendants made the requisite prima facie showing through admissible declarations and shifted the burden to plaintiffs to demonstrate triable issues of material fact. Plaintiffs relied on their expert witness Preston to prove the east-west wet auger was a power press, but his declaration supported the contrary. Plaintiffs insist further discovery would have yielded "essential facts indicating" defendants were "involved with the design or manufacture or modification of" the east-west wet auger that contributed to the February 11, 2011 accident, but do not claim additional discovery

would have disclosed Terra Bella Agland sold or otherwise placed in the commercial stream the east-west wet auger or other wet augers. Lastly, plaintiffs conceded Terra Bella Agland did not own, possess, or otherwise control the Terra Bella facility.

II. Order denying in part plaintiffs' motion to tax costs awarded to Dole

a. *Background*

In a separate appeal (*Ochoa v. Setton Pistachio of Terra Bella, Inc.*, *supra*, F073844), plaintiffs contested the court's March 15, 2016 judgment entered on an order granting summary judgment in favor of Dole. For the reasons set forth in the corresponding opinion, we affirmed that judgment.

In a memorandum of costs dated April 1, 2016, Dole claimed $7,637.79: $1,055 for filing and motion fees; $5,625.41 for deposition costs; $150 for court reporter fees; and $807.38 for courier and express courier fees. Plaintiffs filed a motion to tax costs. Specifically, they asked the court to tax $4,839.26 in deposition costs, $150 in court reporter fees, and $807.38 for courier and express courier fees, which totaled $5,796.64 and reduced recovery to $1,841.15.

On June 14, 2016, the court granted, in part, and denied, in part, plaintiffs' motion to tax costs. It taxed $1,092.54: $807.38 for courier and express courier fees and $285.16 for defense counsel's second-day hotel lodging, room service, and valet parking in connection with Richard Jacobs's deposition.[14]

b. *Analysis*

First, plaintiffs argue the superior court erroneously awarded costs for depositions that were not reasonably necessary. Specifically, they state Dole "used only the deposition of Mr. Gibbons" during the litigation; and (2) the deposition of Jonathan Rodacy occurred after Dole had already succeeded on its motion for summary judgment.

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[14] Richard Jacobs's declaration and deposition are discussed in detail in *Ochoa v. Setton Pistachio of Terra Bella, Inc.*, *supra*, F073844.

"The necessity for a deposition and for the related expenditures is a question for the trial court's sound discretion." (*County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113; see *Chaaban v. Wet Seal, Inc.* (2012) 203 Cal.App.4th 49, 57 ["The recovery of deposition costs does not depend on whether the deponent ultimately testifies at trial. [Citation.] The standard is whether the cost is 'reasonably necessary to the conduct of the litigation.' "].) At the May 16, 2016 hearing on the motion, the following exchange transpired regarding the costs associated with Gibbons's, Cohen's, and Fellner's depositions:

> "[PLAINTIFFS' COUNSEL]: . . . We object to Cohen, Gibbons, and Fellner.
>
> "THE COURT: Cohen, Gibbons, and Fellner. And why do you object to them?
>
> "[PLAINTIFFS' COUNSEL]: They were not used by [Dole] at any stage in this litigation.
>
> "THE COURT: They presented declarations, did they not?
>
> "[PLAINTIFFS' COUNSEL]: Yes, they did.
>
> "THE COURT: For summary judgment. You are just saying the transcripts weren't used, but as to the depositions, don't you agree they were necessary for the conduct of the litigation?
>
> "[PLAINTIFFS' COUNSEL]: Plaintiffs paid for the transcription. For the copies, [Dole] just paid for a transcript. [¶] . . . [¶]
>
> "THE COURT: And your reason for that?
>
> "[DEFENSE COUNSEL]: Because they were a part of the litigation. We needed those transcripts. . . . [W]e thoroughly and deeply reviewed and relied upon those transcripts as part of the motion, your Honor.
>
> "THE COURT: Those costs will be allowed . . . as reasonable and necessary to the conduct of the litigation."

The court also explained why the costs for Rodacy's deposition would be allowed:

> "[T]he Court allows for the deposition costs for Mr. Rodacy's deposition . . . as necessary to [the] conduct of litigation . . . . Even though the deposition was taken after summary judgment, Mr. Rodacy's deposition testimony has been an issue in this litigation against Dole from before the summary judgment and continues to be through Plaintiffs' motion for new trial."

We find no abuse of discretion. "The court was well within its discretion to allow [Dole] to recover the amounts expended in deposing [Gibbons, Cohen, Fellner, and Rodacy]." (*Chaaban v. Wet Seal, Inc., supra,* 203 Cal.App.4th at p. 57.)

Next, plaintiffs argue the court erroneously awarded more money in costs than stated in Dole's memorandum of costs. We agree. Dole claimed $7,637.79; the court taxed $1,092.54. The recovery should have been reduced to $6,545.25. Instead, the court's order calculated a recovery of $7,351.81, which exceeds the proper amount by $806.56.

DISPOSITION

The judgment of the superior court entered on an order granting summary judgment is affirmed. Costs on appeal are awarded to defendants Setton Pistachio of Terra Bella, Inc., and Terra Bella Agland, LLC.

The court's award of costs to defendant Dole Food Company is reduced from $7,351.81 to $6,545.25. Its order denying, in part, plaintiffs' motion to tax costs is otherwise affirmed.

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DETJEN, Acting P.J.

WE CONCUR:

_____
MEEHAN, J.

_____
DESANTOS, J.